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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-316

NATIONAL ASSOCIATION OF WOMEN'S AND CHILDREN'S APPAREL SALESMEN, INC., STYLE EXHIBITORS, INC., and MARSHALL J. MANTLER,

Appellants

v.

FEDERAL TRADE COMMISSION,

Appellee

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RAYMOND R. DICKEY
1120 Connecticut Ave., N.W.
Washington, D.C. 20036

SHERWYN E. SYNA
1819 Peachtree Road, N.E.
Atlanta, Georgia 30309

Of Counsel:

ROBERT D. ROADMAN
1120 Connecticut Ave., N.W.
Washington, D.C. 20036

DANZANSKY, DICKEY, TYDINGS, QUINT & GORDON
1120 Connecticut Ave., N.W.
Washington, D.C. 20036

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Appellants

v.

FEDERAL TRADE COMMISSION,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above-entitled case.[1] [Appendix A]

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[1] The judgment affirmed and ordered enforcement of a Federal Trade Commission Order requiring petitioners to cease and desist certain acts and practices held to be violative of Section 5 of the Federal Trade Commission Act [15 U.S.C. §45].

CITATIONS TO OPINIONS BELOW

The decision of the Federal Trade Commission, pursuant to which Petitioners were ordered to cease and desist from certain of their practices, is reported at____ FTC ____(1971, Docket No. 8691) [Appendix C]. The opinion of the United States Court of Appeals for the Fifth Circuit which affirmed and ordered enforcement of the Federal Trade Commission Order is reported at____ F.2d____ and appears herein as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on May 21, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the majority opinion of the United States Court of Appeals for the Fifth Circuit, which held that Petitioner, National Association of Women's and Children's Apparel Salesmen, Inc. ("NAWCAS") was not a labor organization within the meaning of Section 2(5) of the National Labor Relations Act, as amended, is contrary to this Court's decision in *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 79 S.Ct. 1015 (1959), when NAWCAS is an organization which exists for the purpose in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work, but when such an organization has been disqualified by the National Labor Relations Board from certification as a collective bargaining representative.

2. Whether an organization which exists for the purpose in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work, and which has been held to be a labor organization by the National Labor Relations Board, but has been disqualified by that Board from certification as a collective bargaining representative, is entitled to immunity from antitrust liability in its pursuit of the legitimate objects of labor as provided by Sections 6 and 20 of the Clayton Act [15 U.S.C. §17; 29 U.S.C. §52] and the Norris-LaGuardia Act [29 U.S.C. §101, *et seq.*].

STATUTES INVOLVED

The statutes involved are Section 5 of the Federal Trade Commission Act [15 U.S.C. §45]; Section 2(5) of the National Labor Relations Act, as amended, [29 U.S.C. §152(5)]; Sections 6 and 20 of the Clayton Act [15 U.S.C. §17; 29 U.S.C. §52]; and Sections 2, 4, 5 and 13 of the Norris-LaGuardia Act [29 U.S.C. §§102, 104, 105 and 113]. These are printed herein as Appendix E.

STATEMENT OF CASE

The Federal Trade Commission ("Commission") issued its Complaint herein on July 11, 1966, charging petitioners and others with having engaged in unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act [15 U.S.C. §45].

The Complaint charged, in substance, that petitioners had combined and conspired to hinder competition in the sale of women's and children's apparel in that petitioners had: (1) refused to promote or display goods of

manufacturers who did not comply with petitioners' terms and conditions; (2) induced and coerced manufacturers to comply with petitioners' terms and conditions; (3) published lists of uncooperative manufacturers; (4) required written contracts concerning terms and conditions of employment between member-salesmen and their manufacturers; (5) restricted members from changing their membership from one affiliate to another; (6) required affiliates to set non-conflicting show dates; (7) prevented one member from trying to get a manufacturer to hire him instead of another salesman-member already representing such manufacturer; (8) prohibited members from showing merchandise when or where they desired; (9) restricted the number of lines an associate member could exhibit at trade shows owned and operated by local affiliates of petitioner NAWCAS; and (10) restricted membership. [JA 1-8][2]

On August 29, 1966, petitioners filed their Answer to the Complaint [JA 11] in which they set out, *inter alia*, the affirmative defense that the Commission lacked jurisdiction inasmuch as petitioner organizations were labor organizations and the activities complained of were all in furtherance of legitimate labor objectives—namely, to improve wages, hours or working conditions of the members—so as to exempt petitioners from the antitrust laws as provided in Sections 6 and 20 of the Clayton Act [15 U.S.C. §17; 29 U.S.C. §52].

On April 18, 1968, after hearings were held, the Hearing Examiner filed his Initial Decision in which he

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[2] As used herein "JA" means Joint Appendix in the United States Court of Appeals for the Fifth Circuit; "JEA" means Joint Exhibit Appendix (bound separately from the Joint Appendix) in the United States Court of Appeals for the Fifth Circuit.

concluded that the Commission had jurisdiction over the petitioners and over the subject matter of this proceeding, and further that while NAWCAS is a labor organization in its representation of its employee-members, it is a trade association with respect to the activities alleged to be illegal in the Complaint; he therefore found against petitioners on substantially all aspects of the Complaint. [JA 22, *et seq.*] Petitioners appealed the Initial Decision and the Findings of Fact, Reasons for Decision, Conclusions and Proposed Order to the Commission, urging reversal *in toto* [JA 145].

In 1967, during the pendency of the instant matter before the Hearing Examiner, NAWCAS and District 65, Retail Wholesale Department Store Union, jointly filed 31 petitions for representation with Region 2, National Labor Relations Board ("NLRB") in New York City, seeking to be certified as collective bargaining agent for the traveling salesmen of each of the 31 manufacturers. [JA 122]. On December 13, 1967, the Regional Director issued his Interim Opinion holding NAWCAS to be a labor organization. [JA 146]. The manufacturers petitioned the NLRB to review said determination and after submission of briefs, on October 31, 1969, the NLRB reversed the Regional Director, holding that while NAWCAS was a labor organization it was disqualified from certification as a collective bargaining representative in the industry. [JA 155].[3]

Prior to the issuance of the NLRB decision, on October 15, 1968, the instant matter was argued on appeal before the Federal Trade Commission. Thereafter, on July 31, 1970, the Commission issued its decision without an order in which it modified, but upheld the

[3] *Bambury Fashions, Inc.*, 179 NLRB No. 75 (1969).

Hearing Examiner's Initial Decision. In so doing, the Commission relied heavily upon the NLRB Decision stating that the Board's decision was dispositive of the issue of Commission jurisdiction. The Commission reasoned that the NLRB had exclusive primary jurisdiction to determine the status of petitioners as labor organizations and members thereof; that the Board had held that although NAWCAS was a labor organization it was disqualified from acting as such under the National Labor Relations Act because it competed with manufacturers in the sale of apparel; and that therefore, petitioners were not entitled to the labor exemption from antitrust liability provided by Sections 6 and 20 of the Clayton Act [15 U.S.C. §17; 29 U.S.C. §52].

The Commission deferred issuance of an order, pending submission of proposed orders and briefs by complaint counsel and counsel for petitioners herein and oral argument therein. Subsequently, the Order, dated February 25, 1971, was issued, which in essence prohibited the activities of which complaint had been made. [Appendix D].

On appeal to the United States Court of Appeals for the Fifth Circuit, the Order of the Federal Trade Commission was upheld in a 2-1 decision handed down on May 21, 1973. Therein, the majority opinion held that NAWCAS was not entitled to the labor exemption from antitrust liability provided by Sections 6 and 20 of the Clayton Act [15 U.S.C. §17, 29 U.S.C. §52] and by the Norris-LaGuardia Act [29 U.S.C. §101, *et seq.*], by reason of the fact that it had been disqualified from certification as a bargaining representative by the NLRB's decision in *Bambury Fashions, Inc., supra.*

NAWCAS is a not-for-profit corporation formed in 1945 as a national organization of salesmen of women's and children's apparel and accessories at wholesale

[JA 37]. The organizational meeting was attended by representatives of 26 local organizations of women's and children's apparel salesmen from various cities throughout the United States [JA 53]. The general purpose of the formation of a national group was to create a national association to protect the welfare of salesmen in the women's and children's apparel industry [JA 53]. The importance of combatting the insidious forces within the industry which threatened the salesmen's job and wage security was stressed as an objective of the organization [JEA 2]. At its first convention in December, 1945, there was discussion of whether NAWCAS should affiliate with a labor organization and engage in collective bargaining, but reference to unionism was omitted from the Constitution for reasons of job security and fear of retaliation [JA 53].

The objectives, aims and purposes of NAWCAS, as set forth in its Constitution are: to promote the best interests of its members; to provide a national organization of, and to promote, stimulate and protect the interests and welfare of, salesmen engaged in the wholesale selling of women's and children's apparel and accessories; to cooperate with other salesmen's organizations in kindred fields in order to assure an organized national voice of salesmen; to provide educational programs concerned with the welfare and security of salesmen; to establish and maintain an active employment clearing house; to support measures that are fair, reasonable and equitable to the interests and welfare of salesmen; to foster a cordial relationship between manufacturers, retailers and salesmen; and to represent the members as their collective bargaining agent, and, where appropriate, to negotiate collective bargaining agreements in their behalf [JA 54].

Membership in NAWCAS includes both individual salesmen who offer for sale women's and children's apparel at wholesale, and local affiliated organizations composed of such salesmen in various cities throughout the United States [JA 58]. There are some members who do not belong to an affiliate and are designated as "individual regional members" [JA 37, 58]. The member-salesmen of NAWCAS consist of both traveling salesmen and resident salesmen (sometimes known as "inside" or "house" salesmen), the latter manning the manufacturers' showrooms [JA 59, 60].

When the complaint herein was filed, there were 72 local affiliates of NAWCAS, located throughout the United States and approximately 12,500 salesmen-members of NAWCAS [JA 59]. At the close of testimony, primarily as a result of mergers of affiliates, NAWCAS had 65 affiliated local organizations [JA 59].

Petitioner Marshall J. Mantler has been Executive Director of NAWCAS since December, 1947 [JA 38].

Style Exhibitors, Inc. ("Style"), a local affiliate of NAWCAS in Chicago, Illinois, is a not-for-pecuniary-profit corporation organized under the laws of Illinois [JA 39]. It has been affiliated with NAWCAS since the formation of NAWCAS in 1945 [JA 53].

Almost all of the local affiliates of NAWCAS, including Style, sponsor trade shows at the commencement of each selling season [JA 50]. At such shows, member-salesmen display samples of the manufacturer's line or lines to buyers for retail stores [JA 48].

When Marshall J. Mantler became Executive Director of NAWCAS in December, 1947, NAWCAS had 21 local affiliates and approximately 2,200 individual members [JA 309]. At that time, salesmen of women's and children's apparel had no economic security whatsoever; they had no job security, no written contracts with their

manufacturers, no fringe benefits and no pension plans [JA 309]. Since that time NAWCAS has sought and achieved for its members, better terms and conditions of work, a grievance procedure to govern disputes with manufacturers, greater job security and fringe benefits (including insurance, retirement and death benefit programs). Such goals were achieved as the result of the continual dealings by NAWCAS on behalf of its member-salesmen with the manufacturers of women's and children's ready-to-wear to secure for the NAWCAS member-salesmen greater economic security and other terms and conditions of employment commonly sought by labor organizations for their members.

Two of the major goals which NAWCAS has sought for its members have been the establishment of a system of grievance arbitration and industry-wide acceptance of its standard contract of employment for salesmen, both of which goals the majority opinion below recognized to be legitimate objectives of a "bargaining representative" [Slip opinion, page 5, footnote 6].

REASONS FOR GRANTING THE WRIT

I.

THE COURT BELOW DECIDED A SIGNIFICANT QUESTION OF FEDERAL LAW IN DIRECT CONFLICT WITH THIS COURT'S DECISION IN *NLRB v. Cabot Carbon Co.*

Circuit Judge Simpson, in his dissent to the majority decision below, recognized clearly the continuing failure of the majority decision to apply the principles enunciated by this Court in *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 79 S.Ct. 1015 (1959), wherein this Court *reversed* the same Fifth Circuit in *Cabot Carbon Co. v.*

NLRB, 256 F.2d 281 (C.A. 5, 1958). In his dissent, Judge Simpson indicated that the majority below erred in equating the term "bargaining" with the term "dealing with," and erred in equating disqualification of an organization to act as a collective bargaining representative with the status of such an organization as a labor organization within the meaning of Section 2(5) of the National Labor Relations Act, as amended [29 U.S.C. §152(5)] and within the meaning of Sections 6 and 20 of the Clayton Act [15 U.S.C. §17; 29 U.S.C. §52] and the Norris-LaGuardia Act [29 U.S.C. §101, *et seq.*]. Judge Simpson indicated that by so doing, "the majority have fallen into" precisely the same trap as did the Fifth Circuit previously in *Cabot Carbon Co. v. National Labor Relations Board*, 256 F.2d 281 (C.A. 5, 1958), which was subsequently reversed by this Court as indicated hereinabove. In the instant proceeding, as in *Cabot Carbon*, the failure of the Fifth Circuit to accord the broader meaning to the term "dealing with" which was intended by Congress has resulted in wrongfully depriving the petitioners of their proper labor organization status (and the individual Petitioner, Marshall J. Mantler of his status as an officer, agent, or employee of a labor organization–NAWCAS) and, therefore, exemption from antitrust liability which is derived therefrom.

The majority below held that because NAWCAS had been disqualified from certification as a bargaining representative by the NLRB, it is not entitled to the status of a "labor organization" and thus is to be accorded no exemption from the antitrust laws. In this regard, the majority below stated that:

> "... labor's cloak of immunity [from the antitrust laws] must be lined with the fact that the putative labor organization is–or could be–the

> bargaining representative for the employees in question. This is so because the antitrust laws yield only insofar as the union pursues legitimate objects of collective bargaining. [Citations omitted]. If an organization cannot . . . function as the collective bargaining agent . . . that organization may not transgress the employee's right to unrestrained competition with impunity under the cloth of a labor label. *NAWCAS v. FTC*, majority opinion, slip opinion at 10-11.

The majority statement relies heavily upon *Bambury Fashions, Inc.*, 179 NLRB No. 75 (1969), which held that although NAWCAS satisfies the statutory definition of a labor organization, it is disqualified from certification as a collective bargaining representative because of an alleged conflict in NAWCAS' representation of employees and its activities in sponsoring trade shows.

The Board in *Bambury Fashions* applied its rule in *Bausch and Lomb Optical Co.*, 108 NLRB 1555 (1954), that ". . . the Union cannot perform its statutory function as *bargaining representative* if simultaneously it is an immediate business competitor of the particular employer whose employees it purports to represent." *Bausch and Lomb Optical Co., supra* at 450 [Emphasis supplied]. However, in applying the rule in *Bausch and Lomb Optical Co.* to the facts in *Bambury Fashions, Inc.*, it is clear, as Judge Simpson stated in his dissent, that the National Labor Relations Board decided no more than that NAWCAS was not qualified to receive certification as a collective bargaining agent, not that NAWCAS is not a labor organization. Indeed, the Board found that NAWCAS is a labor organization.

The statutory definition of a labor organization was made purposely broad in order to encompass groups which represent employees and pursue the objects of

labor by dealing with employers. The definition encompasses organizations which engage in activities significantly broader than merely bargaining collectively with employers. This Court so held in *National Labor Relations Board v. Cabot Carbon Co., supra*, reversing the Fifth Circuit. There, it was recognized that by adopting the broad term "dealing" and rejecting the limited term "collective bargaining", Congress refused to limit narrowly the definition of a labor organization. The legislative history of Section 2(5) confirms that Congress did not intend the two terms to be synonymous. When the Wagner Bill was before the Senate in 1935, the Secretary of Labor proposed an amendment to Section 2(5) which would have substituted the term "bargaining collectively" for the term "dealing,"[4] but the proposal was rejected.[5]

Moreover, when the Taft-Hartley Act was enacted, amending the National Labor Relations Act, the definitional section relating to labor organizations was re-enacted without change. Thus, Congress insured that the legitimate functions of a labor organization would not be limited to collective bargaining functions, but would be extended to many varieties of dealing with employers concerning job standards, job security and other conditions of work. By so doing, Congress insured that the labor exemption from antitrust liability would be extended to all legitimate activities of a labor organization

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[4] Hearings before Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess. 66-67, reprinted in 1 Leg. Hist. (1935) 1442-1443.

[5] S. 1958 (2d print), 74th Cong., 1st Sess. 4, reprinted in 2 Leg. Hist. (1935) 2287.

and would not be limited solely to its collective bargaining functions.[6]

There is no requirement that a labor organization be certified as the collective bargaining agent in order for it to deal with employers. See *National Labor Relations Board v. General Shoe Corp.*, 192 F.2d 504 (C.A. 6, 1951), *cert. denied*, 343 U.S. 904, 72 S.Ct. 635 (1952) in which the court relied upon the finding by a Trial Examiner ". . . . that neither an agreement nor actual bargaining is essential to a finding that an organization is a labor organization within the meaning of the Act." *NLRB v. General Shoe Corp., supra* at 507. There it was held that four employee-representation committees which discussed, advised and dealt with the employer regarding grievances, wages, and other terms and conditions of employment was a labor organization within the meaning of the Act.

In *Indiana Metal Products Corp. v. NLRB*, 202 F.2d 613 (C.A. 7, 1953), the court relied on a finding by the Board that ". . . the Advisory Committee [consisting of an employee-representative for each department in the plant] was established to provide the employees with a substitute for a bona fide collective bargaining representative . . . ." *supra* at 621. The Advisory Committee was a

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[6] Indeed, even absent the holding that NAWCAS is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act [29 U.S.C. §152(5)], so long as it is an organization comprised in whole or in part of employees, and it is involved in a case arising out of a labor dispute, within the meaning of §13 of the Norris-LaGuardia Act [29 U.S.C. §113(a)-(c)], it is entitled to the protections of the Clayton & Norris-LaGuardia Acts. *New Negro Alliance v. Sanitary Grocery Co., Inc.*, 303 U.S. 552, 58 S.Ct. 703 (1938). However, since NAWCAS is a labor organization within the meaning of §2(5) of the National Labor Relations Act, this question need not be considered.

loosely-formed organization, but existed for the purpose of discussing and improving working conditions, and was thus a "labor organization."[7]

Informal employee representation committees, loosely formed groups, pool arrangements and trades councils which deal with employers in matters relating to wages, hours and terms and conditions of employment, but which have not engaged in bargaining collectively with employers, have been held to be labor organizations within the meaning of Section 2(5) of the National Labor Relations Act, as amended. See *NLRB v. Clapper's Manufacturing, Inc.*, 458 F.2d 414 (C.A. 3, 1972); *NLRB v. Ampex Corp.*, 442 F.2d 82 (C.A. 7, 1971), *cert. denied*, 404 U.S. 939, 92 S.Ct. 274 (1971); *National Packing Co. v. NLRB*, 377 F.2d 800 (C.A. 10, 1967); *American President Lines, Ltd. v. NLRB*, 340 F.2d 490 (C.A. 9, 1965); *NLRB v. Buitoni Foods Corp.*, 298 F.2d 169 (C.A. 3, 1962); *Pacemaker Corp. v. NLRB*, 260 F.2d 880 (C.A. 7, 1958); *NLRB v. Standard Coil Products Co., Inc.*, 224 F.2d 465 (C.A. 1, 1955, *cert. denied*, 350 U.S. 902, 76 S.Ct. 180 (1955); *NLRB v. Sharples Chemicals, Inc.*, 224 F.2d 465 (C.A. 1, 1955), *cert. denied*, 350 U.S. *Matthews & Co.*, 156 F.2d 706 (C.A. 3, 1946); *Southeast La. Bldg. & C. Tr. Coun. v. Scheyd, Brennan, Inc.*, 334 F.Supp. 720 (E.D.La., 1971); *United States v. Dicus*, 229 F.Supp. 282 (E.D.Ark., 1964); *Independent Circulation Union v. Item Co.*, 163 F.Supp. 399 (E.D.La., 1958).

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[7] See also *Space Services International Corp.*, 1966 CCH/NLRB ¶20,182 (February 3, 1965), in which a council composed of local labor unions, and which contained no employee members, was held to be a labor organization, even though the council had not yet entered into collective bargaining proceedings, but was formed to "deal with" employers.

Petitioner NAWCAS comes within the statutory definition of a labor organization. Its activities fall squarely within any of the tests or definitions of a labor organization set forth by this Court in *Cabot Carbon Co., supra*, and are similar to the activities performed by the Employee Committees in *Cabot Carbon Co., supra*. NAWCAS exists for the purpose of dealing with employers regarding grievances, wages, and other terms and conditions of employment. The success achieved by NAWCAS in obtaining greater economic and job security for its members was the result of continuous dealing with employers concerning the legitimate objects of labor.

Thus, it becomes manifest that the United States Court of Appeals for the Fifth Circuit decided a significant question of Federal Law in direct conflict not only with the decision of this Court in *NLRB v. Cabot Carbon Co., supra*, but also with decisions of United States Courts of Appeal of at least six other Circuits (First, Third, Sixth, Seventh, Ninth and Tenth Circuits). The effect of the decision of the Fifth Circuit below is erroneously to deny petitioners herein labor organization status.

II.

THE FIFTH CIRCUIT'S HOLDING THAT THE LABOR EXEMPTION FROM ANTITRUST LIABILITY APPLIES ONLY TO AN ORGANIZATION WHICH CAN FUNCTION AS A CERTIFIED COLLECTIVE BARGAINING REPRESENTATIVE IS CONTRARY TO THE LEGISLATIVE PURPOSE OF THE CLAYTON AND NORRIS-LaGUARDIA ACTS.

After erroneously denying NAWCAS status as a labor organization, the majority below compounded that error by holding that the labor exemption from the antitrust laws as accorded by Sections 6 and 20 of the Clayton Act

and the Norris-LaGuardia Act extend only to organizations which can achieve certification as bargaining representatives and only to the extent that such organization is pursuing legitimate "subjects of collective bargaining." [Slip opinion, page 9]

Initially it must be noted that the relevant sections of the Clayton and Norris-LaGuardia Acts, as well as the cases construing those Acts, extend the protection from antitrust liability to organizations in pursuit of the legitimate objects of labor and do not seek to characterize these objects as the legimate subjects of collective bargaining.

Secondly, even assuming *arguendo* that the Fifth Circuit correctly limited the exemption to a labor organization pursuing the legitimate subjects of collective bargaining, that court recognized that the two chief objectives which petitioners sought to obtain and which the order of the FTC bars are legitimate goals of a "bargaining representative." Thus, the basic question is whether the labor exemption is to be extended to legitimate labor activity, even though the labor organization in question cannot be certified as a collective bargaining representative when the organization does in fact deal with employers concerning wages, hours, grievances, labor disputes and other terms and conditions of employment. Petitioners submit that a reading and analysis of the applicable statutory provisions and case law require an affirmative answer.

Section 6 of the Clayton Act [15 U.S.C. §17], which was hailed as the Magna Carta of labor when enacted in 1914, provides that "the labor of a human being is not a commodity or article of commerce." It provides further that the antitrust laws shall not be construed to forbid the existence and operation of labor organizations instituted for the purposes of mutual help, nor to forbid

individual members of such organizations from carrying out the legitimate objects of such organizations. Section 20 of the Clayton Act [29 U.S.C. §52] broadly exempts from the antitrust laws and other laws of the United States an organization engaged in a labor dispute and related categories of activities. Neither of these sections of the Clayton Act which provide the very foundation for the labor exemption even mention the term "collective bargaining."

In Section 2 of the Norris-LaGuardia Act [29 U.S.C. §102], the Congress provided that it is to be the public policy of the United States to permit and insure the ability of the worker to have

> "... full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining, *or other mutual aid or protection*; ..." [Emphasis supplied.]

Clearly, Congress, in establishing the public policy in labor matters in the Norris-LaGuardia Act, provided and recognized that the legitimate objectives of labor were far broader than the simple formalized collective bargaining procedure.

Moreover, in Section 13 of the Act which contains definitions [29 U.S.C. §113], the term "labor disputes" is defined as including any controversy concerning terms or conditions of employment or concerning the association and representatives of persons in negotiating, *fixing, maintaining, changing*, or *seeking to arrange* terms or conditions of employment. Again, Congress therein provided that the protections to be accorded to labor

organizations and its exemption from antitrust liability as well as other judicial restrictions is to include legitimate activities in addition to the formalized collective bargaining process.

Finally, in the National Labor Relations Act, as amended, as discussed *supra*, a labor organization is defined as an organization of any kind, or any agency or employee representation committee or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work. Thus, Congress has recognized that a labor organization is an organization which may deal with employers by methods other than by the process of bargaining collectively on behalf of employees.

It is the status of a labor organization under Sections 6 and 20 of the Clayton Act and under the Norris-LaGuardia Act which is determinative of its qualification for the labor exemption from antitrust liability. Immunity from the antitrust laws is not limited merely to a certified collective bargaining agent, but is extended to "labor organizations, . . . instituted for the purpose of mutual help . . ."[8] and ". . . any organization of any kind, . . . in which employees participate and which exists for the purpose, . . . of dealing with employers . . . ."[9]

The question of whether the activities of a labor organization violate the antitrust laws can be determined only by reading the antitrust laws, Sections 6 and 20 of the Clayton Act, and the Norris-LaGuardia Act as a "harmonizing text." *United States v. Hutcheson*, 312

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[8] Section 6 of the Clayton Act.

[9] Section 2(5) of the National Labor Relations Act.

U.S. 219, 231; 61 S.Ct. 463, 466 (1941); *Allen Bradley Co. v. Local Union No. 3*, 325 U.S. 797, 806; 65 S.Ct. 1533, 1538 (1945).

It must be noted also that the labor exemption from antitrust liability accorded by Sections 6 and 20 of the Clayton Act was enacted into law some 21 years prior to the creation of the NLRB by the National Labor Relations Act and expanded by the Norris-LaGuardia Act (1932) created a long-established national policy favoring exemption of labor organizations from antitrust liability. This policy existed separate and apart from and prior to the enactment of the National Labor Relations Act which extended protection to labor organizations and the members thereof in bargaining collectively with employers.

In view of these concepts and in view of the analysis of the legislative provisions giving life to the antitrust exemption, the narrow construction placed upon the labor exemption by the majority of the court below in restricting its applicability to a certified collective bargaining representative is not only unwarranted, but is in direct contradiction to the clearly expressed legislative purpose of the exempting legislation—and to the decided case law as discussed hereinafter.

The collective bargaining concept is a relatively recent development in the history of the labor movement. Many legitimate activities of a labor organization such as those performed by NAWCAS are activities which have been pursued historically in the context of a labor dispute to secure legitimate objectives of labor long prior to the inception of formalized certification procedure for the collective bargaining function. This Court has recognized on several occasions that organizations engaged in a labor dispute are to be extended the exemption accorded by

Sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act even though the labor dispute in question did not arise from the collective bargaining process. *American Federation of Musicians v. Carroll*, 391 U.S. 99, 88 S.Ct. 1562 (1968); *Hunt v. Crumboch*, 325 U.S. 821, 65 S.Ct. 1545 (1945); *New Negro Alliance v. Sanitary Grocery Co., Inc.*, 303 U.S. 552, 58 S.Ct. 703 (1938). Indeed, in extending the antitrust exemption to the activities of the American Federation of Musicians in the so-called "club-date" field of music, this Court recognized that

> "There are no collective bargaining agreements in the club-date field. Club-date engagements are rigidly regulated by unilaterally adopted union by-laws and regulations." *American Federation of Musicians v. Carroll, supra*, at p. 104.

In the face of these decisions of this Court, it is worth the risk of repetition that the holding of the Fifth Circuit in refusing to accord petitioners the exemption from antitrust liability provided by Sections 6 and 20 of the Clayton Act and the Norris-LaGuardia Act is contrary not only to the public policy announced by Congress in those statutory provisions, but also to the relevant case law construing those provisions. Petitioner NAWCAS is a labor organization which deals with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work within the meaning of Section 2(5) of the National Labor Relations Act, as amended [29 U.S.C. §152(5)] and cannot be denied the Clayton Act and Norris-LaGuardia Act exemptions simply because it cannot bargain collectively with those employers. In so holding, the United States Court of Appeals for the Fifth Circuit erred.

CONCLUSION

For all the foregoing reasons, petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

RAYMOND R. DICKEY
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

SHERWYN E. SYNA
1819 Peachtree Road, N.E.
Atlanta, Georgia 30309

Of Counsel:

ROBERT D. ROADMAN
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

DANZANSKY, DICKEY, TYDINGS,
QUINT & GORDON
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

APPENDIX A

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 19 71

No. 71-1880

FTC No. 8691

NATIONAL ASSOCIATION OF WOMEN'S AND CHILDREN'S APPAREL SALESMEN, INC., a/k/a NAWCAS GUILD, ETC., ET AL,

Petitioners,

versus

FEDERAL TRADE COMMISSION,

Respondent.

- - - - - - -

Petition for Review of an Order of the Federal Trade Commission (Georgia Case)

- - - - - - -

Before BROWN, Chief Judge, BELL and SIMPSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the petition of National Association of Women's and Children's Apparel Salesmen, Inc., a/k/a Nawcas Guild, Et Al for review of an order of the Federal Trade Commission of the United States, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Federal Trade Commission in this cause be, and the same is hereby enforced;

It is further ordered that petitioners pay to respondent the costs on appeal to be taxed by the Clerk of this Court.

May 21, 1973

SIMPSON, Circuit Judge, dissenting:

Issued as Mandate: JUN 12 1973

A true copy
Test: [illegible]
Clerk, U. S. Court of Appeals, Fifth Circuit
By [illegible] Deputy
New Orleans, Louisiana JUN 12 1973

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 71-1880

NATIONAL ASSOCIATION OF WOMEN'S AND CHILDREN'S APPAREL SALESMEN, INC., a/k/a NAWCAS GUILD, ETC., ET AL,

Petitioners,

versus

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Review of an Order of the Federal Trade Commission (Georgia Case)

(May 21, 1973)

Before BROWN, Chief Judge, BELL and SIMPSON, Circuit Judges.

BROWN, Chief Judge: We enter the workroom to review the propriety of an FTC cease and desist order which compels the Petitioners, National Association of Women's & Children's Apparel Salesmen (NAWCAS) to

refrain from committing certain unfair trade practices within the context of their regional trade shows. Our role is chiefly that of a tailor: we must dart the seam of two interrelated public policies–the antitrust proscription and its labor exemption. The thread which fastens this seam is composed of three independently woven fibers: (i) is NAWCAS a "labor organization" under the cloak of the Norris LaGuardia Act, 29 U.S.C.A. §104, and Clayton Act §§6,20, 15 U.S.C.A. §17, 29 U.S.C.A. §52, special dispensation for labor? (ii) do the challenged activities arise in the context of a bona fide "labor dispute" as that term is used in these statutory provisions? and (iii) has NAWCAS acted only in its labor self-interest–eschewing any combination with non-labor groups? Unless all three questions can be answered affirmatively, NAWCAS is not entitled to don the protective cloak.

The FTC, relying heavily on an NLRB holding in a collateral proceeding, answered the first two questions negatively and issued its order.[1] National Association of Women's and Children's Apparel Salesmen, 1971,____ F.T.C. _____ [docket no. 8691]. Because we are in agreement on these points, we enforce the order without addressing ourselves to the third question.[2]

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[1] Counsel for NAWCAS conceded before the Commission that if his client's activities were not protected by the labor exemption to the antitrust laws, that their conduct was violative of the Federal Trade Commission Act. Thus, there is no basis from which to attack the Commission's order on its intrinsic merits if the labor exemption will not stand up.

[2] Basing our holding upon the determination that NAWCAS may not act as a labor organization, we need not determine the extent to which certain component members of NAWCAS might constitute non-labor groups. See generally, United States v. Hutcheson,

The Wrinkled Cloak

When the National Association of Women's and Children's Apparel Salesmen was formed in 1945, its avowed purpose was to provide a forum for the free exchange of trade information and a force to represent the best interest of ready to wear clothing salesmen.[3] At that time, NAWCAS stitched together 21 local affiliate groups

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1941, 312 U.S. 219, 61 S.Ct. 463 85 L.Ed. 789; American Federation of Musicians v. Carroll, 1968, 391 U.S. 99, 88 S.Ct. 1562, 20 L.Ed.2d 460; Cedar Crest Hats, Inc. v. United Hatters, 5 Cir., 1966, 362 F.2d 322.

[3] The objective, aims, and purposes of NAWCAS were set forth in Article III, Section 1 of its constitution.

The objectives, aims and purposes of this association shall be educational and for the promotion of the best interests of its members; to provide a national association of all organizations or groups composed of salesmen engaged in the wholesale selling of women's or children's wearing apparel or accessories . . . to promote, stimulate and protect the interests and welfare of salesmen in the women's and children's fields and the industry with which they are concerned . . . to cooperate with organizations composed of salesmen in kindred fields whenever practicable and feasible to the end that a strongly organized national voice of salesmen may be achieved . . . to institute and maintain an educational program concerning itself with the welfare and future security of salesmen . . . to create a clearing house for the interchange and dissemination of pertinent information, ideas, plans and facts helpful to members of affiliated organizations . . . to establish and maintain an active employment clearing house . . . to give wholehearted support to measures that are fair, reasonable and equitable to the interests and welfare of salesmen . . . to provide information and guidance, and promote a policy of helpful services to independent retailers, and generally foster a cordial relationship between manufacturers, retailers and salesmen and to represent the members as their bargaining agents and where appropriate to negotiate collective agreements in their behalf.

of salesmen.[4] One of the primary activities of these affiliates was the sponsoring of regional trade shows to minimize traveling.

There are approximately ten thousand manufacturers of Women's and Children's apparel in the United States, mostly centered in and around the New York City area. Although there are several industry giants, their share of the market is relatively miniscule–90 per cent of the business going to the smaller manufacturers. Their wares are normally marketed through the efforts of the hired salesmen. Most of these men work on commissions, although the trend among the larger firms is toward compensation by a fixed salary. They also tend to work exclusively for one manufacturer–purportedly to preserve design integrity and prevent "line piracy"–unless their territory is so thread-bare that they must represent two or more non-competing lines to make an adequate living.

The most effective method of marketing apparel has been found to be that of the regional, periodic trade show.[5] Sponsoring these shows is the role of the local affiliate. They are usually held in hotels, auditoriums, or

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[4] One of these affiliates, Style Exhibitors, Inc. of Chicago is also a named party in the FTC's order and a petitioner herein. The FTC Examiner determined that the advocacy of Style Exhibitors was adequate to represent the other members of its class of affiliates, all of whom had some notice of the pending proceedings before the FTC. There is no challenge to this ruling on appeal.

[5] Other methods of marketing include direct mail sales, home office showroom sales, regional sales offices in key cities, sales to jobbers, and direct sales to a common buyer/agent for several retailers.

merchandise marts. Long-term advance planning is necessary. The affiliate who sponsors the show rents the necessary facilities, solicits registration from members qualified to exhibit, and provides general logistical support for the registrants. Each show is governed by the rules and regulations of the sponsoring affiliate and violations of the rules may result in a fine or suspension. As noted by the NLRB and FTC, a number of the rules are designed to prevent members from participating in competing shows. Because of the tremendous prestige and economic impact of these shows, participation in them is almost a business necessity.

Many of NAWCAS's tangible goals[6] were union-like. But for the first 11 years its approach was strictly velveteen. Then, at its 1956 convention, NAWCAS adopted the "California Resolution". Under this Resolution NAWCAS decided to exert economic leverage by blacklisting "uncooperative manufacturers" from the affiliates' trade shows. At first the blacklists were confined to those manufacturers who did not put forth a cooperative effort towards resolving disputes with their association-member salesmen. In 1960, however, the economic tool of excluding uncooperative manufacturers from the trade shows was extended to those manufacturers who failed to hire their salesmen under the terms of NAWCAS's standard contract.

[6] The two chief objectives which they sought to obtain via the unfair trade practices under attack were establishment of a binding system of grievance arbitration and industry-wide use of NAWCAS's standard contract of employment for salesmen. Both are certainly legitimate goals of a bargaining representative. They have also established some rather successful programs of insurance, retirement and death benefits.

It is this refusal to deal which the FTC seeks to collar with its order.[7]

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[7]The Commission's order, which is not challenged on its merits in this appeal, requires the Petitioners to cease and desist from the following:

(1) Refusing or threatening to refuse to promote, display, offer or sell, distribute, or sell at any trade show women's and children's apparel or accessories supplied by any manufacturer who is represented by a member of NAWCAS, a member of any affiliate, or person who is otherwise eligible for trade show participation.

(2) Entering into, continuing, cooperating in or carrying out any planned common course of action, understanding, or agreement with any other party for the purpose or with the effect of preventing, hindering, or interferring with a manufacturer from having his merchandise displayed, exhibited, offered for sale or sold in or from any location not actually contracted for and used as space by respondent NAWCAS or by a representative who is a member of NAWCAS, a member of any affiliate, or any person as a part of a NAWCAS trade show participation for the conduct of a trade show sponsored by NAWCAS, its members or affiliates.

(3) Entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, or agreement with any other party for the purpose or with the effect of preventing, hindering, or interferring with a manufacturer's efforts to have his merchandise displayed, exhibited, sold or offered for sale in any space not actually contracted for and used by a representative who is a member of NAWCAS, trade show participation.

(4) Restricting, regulating, or limiting any member of NAWCAS, any member of any affiliate or any person who is otherwise eligible for trade show participation, in the selection of any merchandise that he may wish to display, offer for sale or sell at any trade show or exhibition.

(5) Requiring, whether directly or indirectly any manufacturer of women's and children's apparel or accessories to

comply with any demand, term or condition made by NAWCAS or any of its affiliated members as a condition of having the manufacturer's goods exhibited in a NAWCAS affiliated trade show.

(6) Preparing, printing, publishing or otherwise communicating by any method or means any "uncooperative manufacturers list" or similar device with the purpose or effect of discouraging or preventing the merchandise of any particular manufacturer from being exhibited at any affiliate trade show.

(7) Prohibiting or forbidding any member of NAWCAS or of any of its affiliates, from soliciting the representation of any line of merchandise produced by any manufacturer.

(8) Prohibiting or forbidding any member of NAWCAS or of any of its affiliates, from representing any line of merchandise produced by any manufacturer because said member replaced another member as a representative of said manufacturer.

(9) Prohibiting or forbidding the merchandise of any manufacturer from being promoted or displayed, or offered for sale, distribution or sale by any member of NAWCAS or of any of its affiliates, because said member replaced another member as a representative of said manufacturer.

(10) Conditioning the showing by any member of NAWCAS of any merchandise of any manufacturer at any trade show organized by any affiliate or other NAWCAS group on the execution by said member of a contract with the manufacturer he represents containing terms or conditions established by and acceptable to respondents.

(11) Restricting or limiting any affiliate or NAWCAS group from accepting as a member any person who transfers from another affiliate or otherwise is eligible or qualified to sell merchandise of any manufacturer.

(12) Requiring any affiliate or other NAWCAS group to agree with any other affiliate on dates when or places where merchandise may be displayed or exhibited, offered for sale, or sold, except that nothing shall prevent any affiliate from continuing to utilize the dates at which such affiliate customarily held its shows, or voluntarily agree to show dates.

The Ironing Board

The FTC skirted the necessity of ruling directly on the extent of protection afforded to NAWCAS's activities by labor's cloak of antitrust immunity by relying on the

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(13) Denying or granting courtesy or provisional showing of merchandise to any manufacturer unless said manufacturer is first approved by NAWCAS or a NAWCAS affiliate other than the one to which application is being made.

(14) Prohibiting or forbidding any merchandise of any manufacturer represented by a member of NAWCAS or any of its affiliates from being promoted, displayed, exhibited, offered for sale, or sold at any place or any time by said manufacturer, representative, or other representative designated by said manufacturer.

(15) Prohibiting, restricting, or limiting any person or firm engaged in the offering for sale, distribution or sale of women's and children's apparel or accessories from obtaining any room, rooms, or office space at any time in any facility.

(16) Refusing to accept for membership in NAWCAS any individual who is otherwise eligible for membership and is actively and regularly engaged as a salesman or manufacturer who does not have salesmen and who travels a territory or territories himself, of women's and children's wholesale apparel and accessories irrespective of whether such individual was previously denied or excluded from membership.

(17) Refusing to accept as an exhibitor at any trade show any salesman who may also be a manufacturer, importer, wholesaler, or jobber, or officers or employees thereof, whose line or lines of women's and children's apparel are not exhibited at that trade show by a member of NAWCAS or a member of any of its affiliates.

(18) Continuing to retain any provision in its constitution, by-laws, code of ethics, or rules and regulations which contravenes or conflicts in any way with any of the above prohibitions.

opinion of the NLRB in a collateral proceeding, *Bambury Fashions, Inc.*, 1969, ____ NLRB ____ [Appendix at 146-56], to iron out the wrinkles. The Board held that because of the commercial nature of NAWCAS's trade shows it was disqualified from functioning as a labor organization.

The rationale behind this deference to the determination of the Board, is that labor's cloak of immunity must be lined with the fact that the putative labor organization is—or could be—the bargaining representative for the employees in question. This is so because the antitrust laws yield only insofar as the union pursues legitimate subjects of collective bargaining. *Meat Cutter's Union v. Jewel Tea Co.*, 1965, 381 U.S. 676, 689 and 710, 85 S.Ct. 1596, ____, 14 L.Ed.2d 640, 649 and 661; *American Federation of Musicians v. Carroll*, 1968, 391 U.S. 99, 88 S.Ct. 1562, 20 L.Ed.2d 460; *Hunt v. Crumboch*, 1945, 325 U.S. 821, ____ S.Ct. ____, 89 L.Ed. 1954. If an organization cannot, under any set of circumstances, function as the collective bargaining agent of the employees of a particular employer, that organization may not transgress the employer's rights to unrestrained competition with impunity under the cloth of a labor label. *Allen Bradley Co. v. Local Union No. 3*, 1945, 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939.

The authority to determine representational matters under the National Labor Relations Act is vested exclusively with the NLRB. See *NLRB v. Cabot Carbon Co.*, 1959, 360 U.S. 203, 79 S.Ct. 1015, 3 L.Ed.2d 1175. Because of the immediacy usually attending such determinations, there is no means of securing direct judicial review of the Board's determination—it must be attacked

collaterally in the context of an unfair labor practice charge.[8] *Boire v. Greyhound Corporation*, 1964, 376 U.S. 473, 84 S.Ct. 894, 11 L.Ed.2d 849; *Magnesium Casting Co. v. NLRB*, 1971, 401 U.S. 137, 91 S.Ct. 599, 27 L.Ed.2d 735; *Templeton v. Dixie Color Printing Co.*, 5 Cir., 1971, 444 F.2d 1064. Given this commitment, under our national labor policy, to the Board's particular expertise of the task of defining what organizations are labor organizations, we hold that it was proper for the FTC to accord dispositive weight to the Board's holding.[9]

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[8]Notwithstanding this canon of labor law, NAWCAS attempted to collaterally challenge the Board's order. Its futile efforts culminated in National Association of Women's & Children's Apparel Salesmen, Inc. v. NLRB, D.C. Cir., 1972, 465 F.2d 662.

[9]The FTC phrased its deference in terms of "primary jurisdiction". Actually it is more than that. Although the Board's election procedures may occasionally be overturned by a court reviewing an unfair labor practice proceeding, until that time the Board action is unassailable. *Cf.* Coca Cola v. FTC, 5 Cir., 1973, ____F.2d ____ [No. 72-2270]; Alabama Gas Corp. v. FTC, 5 Cir., 1973, ___ F.2d ____ [No. 72-1415, Feb. 7, 1973]. There is no concurrent jurisdiction in another tribunal which stands in abeyance pending reference to the Board, as in most cases of primary jurisdiction. *Cf.* J.M. Huber Corp. v. Denman, 5 Cir., 1966, 367 F.2d 104; Weymouth v. Colorado Interstate Gas Co., 5 Cir., 1966, 367 F.2d 84; Carter v. American Telephone & Telegraph Co., 5 Cir., 1966, 365 F.2d 486.

We are not unaware of Mr. Justice White's opinion in *Jewel Tea* declining to stay the proceeding there until a primary jurisdiction reference to the Board could be made. But he surely did not mean that a Board determination was inconsequential, for he also stated on that same day: "Unquestionably the Board's demarcation of the bounds of the duty to bargain has great relevance to any consideration of the sweep of labor's antitrust immunity." United Mine Workers v. Pennington, 1965, 381 U.S. 657, 665, 85 S.Ct. 1585, ___, 14 L.Ed.2d 626, 633. See also, *Jewel Tea, supra* at 710, 85 S.Ct. at ___, 14 L.Ed.2d at 661 (Opinion of Goldberg, J.).

What the Board actually held in *Bambury Fashions* was that NAWCAS, because of its financial stake in the trade shows themselves, was precluded from acting as a labor organization. Thus, according to the Board, the disqualifying factor "is the latent danger that it may bargain, not for the benefit of unit employees, but for the protection and enhancement of its business interests which are in direct competition with those of the employer at the other side of the bargaining table." *Bambury Fashions, supra* at ____. In essence it washes out to this. An organization purporting to represent the interests of a group of employees may disregard the potential impact of the antitrust laws on their chosen means if the ends to be accomplished are appropriate bargaining subjects for a labor union. But where the organization has a proprietary interest in the means, in and for themselves, it is disqualified from functioning as a labor organization under the protective cloak. "The labor exemption is inapplicable where the union acts not as a union but as an entrepreneur." *Jewel Tea, supra* at 733, 85 S.Ct. at ____, 14 L.Ed.2d at 675 (Goldberg, J.); *Cf. Los Angeles Meat & Provision Drivers Union, Local 626 v. United States*, 1962, 371 U.S. 94, 83 S.Ct. 162, 9 L.Ed.2d 150; *Columbia River Packers Association v. Hinton*, 1942, 315 U.S. 143, ____ S.Ct. ____, 86 L.Ed. 750; *Gulf Coast Shrimpers & Oystermans Association v. United States*, 5 Cir., 1956, 236 F.2d 658.

Given this disqualification by the Board,[10] the FTC

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[10]The Board's finding here is bolstered by an independent finding of the FTC Examiner to substantially the same effect. Of course we are powerless to disturb this finding if "the evidence in the record reasonably supports the administrative conclusion." Colonial Stores, Inc. v. FTC, 5 Cir., 1971, 450 F.2d 733, 739.

was correct in button-holing NAWCAS's anticompetitive activities.

ENFORCED.

SIMPSON, Circuit Judge, dissenting:

I respectfully dissent.

The majority today holds that the Federal Trade Commission properly relied upon the decision of the National Labor Relations Board in a collateral proceeding, *Bambury Fashions*, 1969, 179 NLRB 447, which also involved NAWCAS. In *Bambury Fashions* the Board concluded that NAWCAS was not qualified under the National Labor Relations Act to act as the statutory bargaining representative for certain traveling salesmen who potentially competed with employers by conducting trade shows. The majority concludes that the Commission could rely on this Board decision to hold that because NAWCAS may not act as a bargaining representative, it is not a "labor organization" entitled to the protection of the labor exemption to the federal antitrust laws. The basic holding of the majority is:

> "The rationale behind this [the Commission's] deference to the determination of the Board, is that labor's cloak of immunity must be lined with the fact that the putative labor organization is—or could be—the bargaining representative for the employees in question. This is so because the antitrust laws yield only insofar as the union pursues legitimate subjects of collective bargaining. [citations ommited] If an organization cannot, under any set of circumstances, function as the collective bargaining agent of the employees of a particular employer,

that organization may not transgress the employer's right to unrestrained competition with impunity under the cloth of a labor label." [citation omitted] Majority opinion at 10-11 (typewritten copy).

The Commission's syllogism, which the majority here endorses, is improper because the board decided only that NAWCAS could not be a bargaining representative. It did not hold that NAWCAS was not a labor organization.

The core of the Board's opinion in *Bambury Fashions* was:

> "Finally, nothwithstanding the fact that NAWCAS, as found by the Regional Director, satisfies the two part test of the statutory definition of a labor organization, we find that it is disqualified from acting as such because its interest in representing employee salesmen in the industry conflicts substantially with its primary interest in coordinating and strengthening the trade show activities of its affiliates. We agree with the Employers that NAWCAS in its trade show activities in behalf of independent contractor traveling salesmen members is engaged in the business of selling apparel in direct competition with apparel manufacturers." 179 NLRB at 450.

In *Bambury Fashions* the Board applied its rule in *Bausch & Lomb Optical Co.*, 1954, 108 NLRB 1555, that "... the Union cannot perform its statutory function as bargaining representative if simultaneously it is an immediate business competitor of the particular employer whose employees it purports to represent." Ibid. at 1562. Clearly then the Board's holding in *Bambury Fashions*

was no more than that NAWCAS was disqualified from acting as a bargaining representative, not that NAWCAS was not a labor organization.

The Commission's extension of the Board's position is unwarranted for another reason. While it is true, as the majority states, that a union is exempt from the antitrust laws only insofar as it unilaterally pursues mandatory subjects of collective bargaining—wages, hours and working conditions, *American Federation of Musicians v. Carroll*, 1968, 391 U.S. 99, 88 S.Ct. 1562, 20 L.Ed.2d 460—it does not follow that a union must be the National Labor Relations Act bargaining representative in order to pursue these goals, and hence enjoy the protection of the labor exemption to the antitrust laws. This is true because the umbrella of the antitrust exemption protects labor organizations. A group may be a "labor organization" within the statutory framework of the National Labor Relations Act without being a "bargaining representative" under that Act, as the language of the statute makes clear:

> "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees particpate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." National Labor Relations Act, Section 2(5); Title 29, U.S.C., Section 152(5).

NLRB v. Cabot Carbon Co., 1959, 360 U.S. 203, 79 S.Ct. 1015, 3 L.Ed.2d 1175, demonstrates that the National Labor Relations Act concepts of "labor organization" and "bargaining representative" are not coequal.

In *Cabot Carbon* the NLRB had ordered the employer to cease and desist from unlawfully dominating certain employee committees, which coexisted with Board certified bargaining representatives at certain of the employer's plants. This Court refused to enforce the Board's order on the grounds that by the 1947 amendments to the Act Congress had not intended to include such committees within the statutory definition of labor organization, and that the term "dealing with employers" in the statutory definition of a labor organization meant in reality "bargaining with employers", and that the committees were not statutory bargaining representatives. The Supreme Court reversed, stating that the statutory term "dealing with employers" was not to be read as synonymous with the more limited term "bargaining with employers". 360 U.S. at 211, 79 S.Ct. at 1020, 3 L.Ed.2d at 1180. Further the Court noted that Congress had rejected an amendment which would have substituted the term "bargaining collectively" for "dealing with employers" in the statutory definition of a labor organization. 360 U.S. at 211, 79 S.Ct. at 1021, 3 L.Ed.2d at 1181.

Upon this analysis it seems to me apparent that a group of persons may be a "labor organization" under the terms of the National Labor Relations Act without being a statutory bargaining representative under that Act. Furthermore, the "... grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work", National Labor Relations Act, Section 2(5); Title 29, U.S.C., Section 152(5), about which a "labor organization" deals with an employer are essentially equivalent to the "wages, hours, and working conditions" which constitute mandatory bargaining subjects. Unilateral labor organization activity concerning these mandatory bargaining subjects is immune from the federal

antitrust laws. I conclude that a group which deals with an employer concerning such subjects is immune from the antitrust laws where such dealings are involved, even though that labor organization is not and cannot be the statutory bargaining representative. In short, an organization may pursue legitimate objectives of collective bargaining even though it is not a bargaining representative. Both the Federal Trade Commission and the majority in this case have fallen into the trap of equating qualification to act as a bargaining representative under the National Labor Relations Act with status as a labor organization.

Thus, I think the Commission based its decision below upon improper legal reasoning. A fundamental principle of judicial review of administrative action requires that in order for a reviewing court to sustain agency action the legal grounds upon which the agency acted must be correct. *FTC v. Sperry & Hutchinson Co.*, 1972, 405 U.S. 233, 92 S.Ct. 898, 31 L.Ed.2d 170; *SEC v. Chenery Corp.*, 1943, 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 826. Because the Commission improperly relied upon the Board's decision in *Bambury Fashions, supra*, this case should be remanded to the Commission so that the Commission will have an opportunity to base its decision upon legally correct principles, including the extent to which certain components of NAWCAS might constitute non-labor groups not protected by the labor exemption to the antitrust laws. See generally, *United States v. Hutcheson*, 1941, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 789; *American Federation of Musicians v. Carroll, supra*; *Cedar Crest Hats, Inc. v. United Hatters*, 5 Cir. 1966, 362 F.2d 322. This latter question, which is crucial to the

issue before the Commission, the majority here finds it unnecessary to consider. See majority opinion, footnote 2 at page 3.

For this reason I dissent from the majority opinion.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Caspar W. Weinberger, Chairman
Paul Rand Dixon
Philip Elman
Everette MacIntyre
Mary Gardiner Jones

In the Matter of	)	
	)	
NATIONAL ASSOCIATION OF WOMEN'S AND CHILDREN'S APPAREL SALESMEN, INC. a corporation, et al.	)	DOCKET NO. 8691

OPINION OF THE COMMISSION

I.

Respondents herein, a national association of women's and children's apparel salesmen, its local affiliates and certain individuals, are charged with a violation of Section 5 of the Federal Trade Commission Act by combining and conspiring to restrain trade in the sale of women's and children's apparel and accessories. The hearing examiner generally found the allegations of the complaint sustained and the case is now before us on respondents' appeal from that decision.

Respondents have raised a number of questions for consideration on review. The main thrust of the appeal is

directed to the issue of whether the challenged practices of NAWCAS and its fellow respondents are within the anti-trust exemption for labor organizations; the remaining questions bear on the propriety of the examiner's order entered below. Respondents do not challenge the examiner's findings that they agreed and combined to restrict the times, places and conditions under which clothing manufacturers may show and sell their merchandise, and that the NAWCAS affiliates and their individual members, as well as individual salesmen, have been similarly restricted. Nor do respondents challenge the conclusion that these practices standing alone constitute antitrust violations in contravention of the Federal Trade Commission Act.[1] They contend, however, that their activities as those of a labor organization are within the scope of labor's antitrust exemption and therefore beyond the Commission's jurisdiction.

II.

Before turning to the threshold issue, the applicability of the antitrust exemption for labor organizations, a brief outline of the industry background and the nature of the function of respondents is in order. It should be noted at this point that although we differ with the examiner's legal conclusions on the relevance of the NLRB proceeding involving NAWCAS, the Commision adopts his factual findings, which are based upon an unusually thorough and comprehensive review of the record.

The women's and children's apparel industry is comprised of some 10,000 manufacturers of women's and

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[1] Respondents' counsel, in oral argument before the hearing examiner, conceded that if NAWCAS were a trade association the practices established by the record would constitute a conspiracy in restraint of trade (tr. 5181).

children's apparel and accessories in the United States. The focus of the industry is centered in the New York City area, but the industry is also growing in California and there are some manufacturers in the Midwest. Approximately five firms have annual gross sales in excess of 100 million dollars. Ninety percent of the manufacturers in this field, however, have gross annual sales of one million dollars or less. Despite its fragmented nature, respondents assert there is a trend toward concentration in this industry, which has put salesmen at an economic disadvantage vis-a-vis the larger firms.

The industry has a number of sales options available to it. The manufacturers may sell direct in their own sales room or through so-called resident or inside salesmen usually compensated on a straight salary basis. In addition, goods are sold by traveling salesmen paid on, generally, a commission basis and who may represent one or more manufacturers. Customarily, traveling salesmen belong to one or more NAWCAS affiliates, which conduct the trade shows which are central to this proceeding. Other sales methods are available to the industry, but it is with these channels of distribution that this proceeding is concerned.

Respondent National Association of Women's and Children's Apparel Salesmen, Inc. (NAWCAS) is a corporation comprised primarily of wholesale clothing salesmen, affiliated organizations, and groups of salesmen. It was organized in 1945 and its membership varies from year to year, the latest data in the record showing between 12 to 13 thousand individual members and some 65 affiliated organizations. The bulk of NAWCAS' individual membership consists of traveling salesmen.

Most of the local NAWCAS affiliates, with the exception of those in the Manhattan region, are comprised of traveling salesmen in the women's and children's apparel field and are organized primarily for the purpose of putting on trade shows where merchandise is sold at wholesale to retail buyers. Typical of the respondent affiliates is Style Exhibitors, Inc. (Exhibitors) of Chicago, Illinois, which sponsors four trade shows a year, at which some 1500 to 2000 lines of merchandise are shown.[2] Its 900 members, who must be traveling salesmen, are also members of NAWCAS. Exhibitors institutes and enforces the rules and regulations governing its shows, including the rules for behavior at such shows and rules excluding its members from competing events and sales outlets. As already noted, it is respondents' operation of trade shows and restrictions on the participation and the manner of participation in these events which gave rise to this proceeding.

As the hearing examiner found, trade shows assist "the salesmen members in obtaining commissions, they assist the manufacturers in obtaining orders for merchandise, and they assist the retailers who attend them in finding competitive goods assembled at a single point for their convenience" (I.D., pp. 46-47); moreover, the trade shows of the respondent affiliates are in commercial competition with the shows set up by manufacturers and those of competing groups, a finding of the examiner with which we agree.

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[2]The examiner's finding that the NAWCAS-affiliated organizations that put on trade shows are a class and that respondent Exhibitors affords adequate representation to such class is not challenged on appeal.

The crucial importance of NAWCAS and the trade shows of its affiliates for the women's and children's apparel industry is documented by respondents' own estimate that their seventy-odd markets with some 294 shows account for $3.5 to $4.5 billion dollars of annual ready-to-wear sales.[3] Clearly the amount of trade affected is substantial.

NAWCAS, in addition to coordinating and supporting respondents' trade shows, engaged in a number of other activities also designed to further the economic well being of its individual members. Certain of these had a direct bearing on the restrictions inherent in the operations of respondents' trade shows challenged in this proceeding. As the examiner found, NAWCAS maintains a self-insured or contributory benefit organization, an arbitration procedure for handling the disputes of its members against manufacturers,[4] and recommends a standard form of contract to be negotiated by its salesmen. As noted below, attempts to enforce the arbitration procedure and the standard contract program was tied into the operation of respondents' trade shows and led to the institution of certain of the restraints alleged illegal in the complaint by denying access to this channel of distribution to those manufacturers deemed uncooperative by NAWCAS, in the case of the arbitration procedure, or who refused to enter approved contracts.

III.

It is respondents' trade shows which permitted them to fasten the challenged restraints on the wholesale sale of

[3]CX 16-F.

[4]CX 59, "The Arbitration Story".

women's and children's apparel. Respondents' utilization of the so-called "uncoooperative manufacturer" lists is, perhaps, the clearest illustration of the illegal combination. The record sustains the finding that respondents circulated among themselves lists of "uncooperative manufacturers" for the purpose of precluding them from using trade shows to promote and sell their merchandise.[5] Apparel manufacturers and NAWCAS members were further restricted in their participation in respondents' trade shows by the requirement that any new member or any member acquiring a new apparel line enter into the standard NAWCAS contract or a substantially similar agreement as a condition to participating in any trade show operated by a NAWCAS affiliate. This requirement, as the examiner found, effectively prohibited manufacturers and members without approved contracts from utilizing respondents' trade shows as a vehicle for distributing their goods. The policing mechanism to enforce this requirement, described in detail by the examiner, was systematically enforced and effective.

Manufacturers, in addition to the restrictions surrounding the NAWCAS contract program, were subjected to regulations designed to prevent them from engaging in "design piracy" (*i.e.*, copying their competitors' design) and restricted in the operation of their salesrooms when a NAWCAS trade show was operated in the same city. Moreover, NAWCAS and its affiliates, through the execution of master leases, in certain merchandise marts

[5] Respondents had ceased formal circulation of lists of uncooperative manufacturers through the medium of the NAWCAS News in 1961, but they continued to circulate such lists until approximately 1963, when they became aware of the Federal Trade investigation in this proceeding. Moreover, NAWCAS' published rules and regulations continued to retain an uncooperative manufacturers clause.

required such marts to operate in accordance with the wishes of the affiliate holding the lease, thus channeling the sale of the manufacturer's line through the affiliate's trade show.

Reinforcing these restrictions were restrictions on the affiliate members, preventing the expelled member of one affiliate from joining another until the cause of the expulsion had been removed, two years had passed from the date of suspension, or the cause of expulsion waived by the expelling affiliate. Certain affiliates also restricted the number of lines which a salesman could exhibit at trade shows. Affiliates which were required to enforce the uncooperative manufacturer's rule and NAWCAS' rules on contracts, were of necessity restricted in their own operations as the result of such combination in the number of lines which could be exhibited at their shows. In addition, as the examiner found, the affiliates were required to coordinate the dates of showing to prevent conflicts.

The same restrictions bearing on manufacturers and the respondents' affiliates bore even more heavily on the individual members. As the examiner noted:

> "... The individual members, indeed, bear the brunt because their livelihood is dependent, in part, upon their ability to show the lines of the manufacturers they represent at trade shows. ..." (I.D., p. 66).

In addition, the record documents a combination among respondents to restrain competition between individual salesmen by seeking to prevent one salesman from representing those lines already represented by another (line piracy) and by restrictive qualifications on

membership, which in turn may restrict the manufacturers' opportunity for sales. Moreover, some of the regulations were, as the examiner found, administered in an arbitrary and unreasonable manner, *e.g.*, one affiliate barred a prospective member because of his brother's alleged unethical activity. In another instance a salesman was fined because the manufacturer he represented kept a salesroom open, over which the salesman had no control.

IV.

The examiner found that NAWCAS is a trade association in its involvement in trade show activities, but that the respondent is also a labor organization insofar as it represents employees within the meaning of the Norris-LaGuardia, National Labor Relations and Clayton Acts. He concluded that the restrictive practices challenged in this proceeding were carried out in connection with respondent's commercial operation of trade shows and thus within the scope of the Federal Trade Commission Act. He also found that these activities had been taken in concert with nonlabor groups.[6] In reaching his decision the examiner concluded, in addition, that the National Labor Relations Board does not have exclusive primary jurisdiction in determining whether NAWCAS is a labor organization and that a prior decision by an NLRB regional director on this point[7] is not relevant to this

[6] *I.e.*, NAWCAS members who are representatives of management, members who are self-employed independent contractors who are themselves employers, as well as merchandise marts and hotels.

[7] *Bambury Fashions, Inc.*, Cas. No. 2-RC-14631 et al., Dec. 13, 1967, a proceeding limited to the issue of whether NAWCAS is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act as amended.

Agency's determination of whether respondents are engaged in illegal commercial entrepreneurial activity.

Throughout the proceeding respondents have consistently maintained that the Labor Board "has exclusive original jurisdiction to determine whether an organization is a 'labor organization' within the meaning of the National Labor Relations Act as amended . . . [and] that it is the duty of other tribunals to defer to the NLRB's determination that an organization is a 'labor organization' until and unless such determination has been authoritatively rejected by the courts or by the NLRB itself."[8]

The Regional Director's decision that NAWCAS is a labor organization within the meaning of the National Labor Relations Act was appealed to the Labor Board.

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[8]Respondents' Appeal Brief, p. 7. Subsequently, respondents did oppose the introduction into this record of the Board's decision. That opposition was apparently grounded not on a change of heart on respondents' part that the Commission, as a general rule, should defer to the NLRB's decision on this point, but, rather, that the Board's decision is simply wrong in this instance. In this connection, respondents assert that they will seek to appeal the NLRB's ruling and that the evidence in the Labor Board proceeding is more limited than the data in this case relating to the status of traveling salesmen. We reject these contentions. The finding of the Board that the respondent associations are dominated by traveling salesmen with the status of independent contractors is consistent with the record of this case, as the examiner's findings demonstrate. The Board's conclusion that NAWCAS is disqualified as a labor organization and that trade shows are a commercial enterprise in competition with manufacturers rests essentially on that finding. The fact that a different conclusion may or may not be justified as to the relationship of traveling salesmen to a few of the larger manufacturers, as respondents assert, does not vitiate the Board's decision on that score.

That agency, by order and decision of October 30, 1969, while not specifically reversing the Regional Director's finding that NAWCAS is a labor organization, held nevertheless that the respondent association is disqualified from acting as a labor organization under the laws entrusted to it for enforcement. Accordingly, it dismissed the joint petition for certification under the National Labor Relations Act. The Board's action has direct relevance to this proceeding for an organization found disqualified by the NLRB from acting as a labor organization cannot shelter behind labor's antitrust exemption. That result follows, since the applicability of the labor antitrust exemption is to be determined on the basis of a joint consideration of the antitrust and labor laws in order to harmonize the policies embodied therein.[9] We agree with respondents that we should defer to the finding of the Board on the issue, since, after all, it is the national agency charged with the administration of federal labor law.[10] To that extent we modify the initial decision before adopting it. We turn now to the Board's decision dispositive of this issue.

NAWCAS and District 65, Retail Wholesale and Department Store Union, AFL-CIO (District 65), filed a joint petition for certification by the NLRB under the National Labor Relations Act. The employers, in opposition to the joint petition, contended that NAWCAS is not qualified to act as a labor organization because:

"(1) its primary function is the operation of a business in direct competition with the Employers,

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[9] See *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers*, 325 U.S. 797, 806 (1945).

[10] *Cf. Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U.S. 173, 181 (1962).

(2) high ranking officials of NAWCAS, who set major policies, are also representatives of management or employers in the industry in which NAWCAS seeks certification, (3) most members of NAWCAS are independent contractors, (4) NAWCAS uses coercive means to obtain and retain members, and (5) NAWCAS seeks certification to avoid prosecution by the Federal Trade Commission in a restraint of trade complaint proceeding. . . ."[11]

In reversing its regional director and determining that NAWCAS is disqualified from acting as a labor organization within the scope of the National Labor Relations Act, the Board made, essentially, two findings. First, the Board found that the traveling salesmen, constituting the great majority of affiliates holding shows, are independent contractors rather than employees; and, second, that the trade shows, insofar as they are operated for the benefit of such independent contractors, are in competition with the manufacturers.

In reaching this result the Board applied the common law, right of control test, which "turns essentially on whether the person for whom the services are performed retains the right to control the *manner* and *means* by which the result is to be accomplished, or controls *only* the result. If the *latter*, the status is that of an independent contractor. The resolution of this question depends on the facts of the case. No one factor is determinative."[12] In its determination that under the right of control test the majority of NAWCAS traveling salesmen should be held to be independent contractors, the Board relied

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[11] *Bambury Fashions, Inc.*, 179 NLRB No. 75 (Oct. 30, 1969), slip op., p. 2.

[12] *Bambury Fashions, Inc., supra* note 11, at 8, n.11. (Emphasis in original.)

primarily on the NAWCAS standard contract. Traveling salesmen, under the terms of that contract,[13] the Board found, "are granted the right to control the means by which the manufacturer's line of apparel is sold within a defined territory, and the manufacturer retains the right to control only the result... Accordingly, we find that the traveling salesmen who participate in NAWCAS trade shows are independent contractors."[14] With that determination, which is entirely consistent with the findings of the examiner below, we are in full agreement. It is these salesmen, as the Board found, who, through their elected delegates to NAWCAS, exercise substantial majority control over that respondent. Those salesmen who are employees, as the Board found, clearly have a minority voice in the affairs of NAWCAS.

It is true that not all individual traveling salesmen who are members of show-holding affiliates are under the precise form of the standard contract on which the Board relies (CX 618 A-B). Use of that form commenced in 1966, superseding prior forms, and, on occasion, contracts with differing provisions were negotiated with certain manufacturers and approved by NAWCAS. Nevertheless, the presumption is that the terms of the "standard" contract accurately reflect the status of the great majority of the traveling salesmen who are members of NAWCAS and its affiliates.[15] In this connection it may be noted that NAWCAS and its officials, in

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[13]CX 618 A-B.

[14]*Bambury Fashions, Inc., supra* note 11, at 8-9.

[15]As the examiner found:

"Under the requirements laid down by NAWCAS all salesmen were required by January 1, 1967, to have a written contract on NAWCAS Standard Contract form, or its equivalent. As a practical matter, this requirement has not been enforced. But, NAWCAS claims to have a total of over 15,000 contracts on file (approved

documents, prior to the litigation, frequently referred to the traveling salesmen as independent contractors.[16] Moreover, as the Board noted, the recitation of the record facts in this proceeding pertaining to the relationship of traveling salesmen to manufacturers, set forth in Appendix B of the initial decision, is consistent with the right of control over the manner and means of their work granted traveling salesmen in the NAWCAS-sponsored contracts.

Finally, as far as the salesmen's conduct in the multi-billion dollar trade show market is concerned, this is completely and minutely subject to respondents' rules and regulations, which, of course, ultimately depend on the consent of the individual members, the traveling salesmen. As far as this crucial segment of the women's

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and not approved) so that its standard form is of some significance insofar as it specifies the relationship between the salesman and the manufacturer. This form has been changed from time to time (CXs 616-618). It is not possible from the survey data in evidence (RX 174) to determine how many contracts on each particular form are outstanding at the present time. We accordingly take the latest form available (CX 618-A-B) as illustrating the present requirements of NAWCAS." (I.D., Appendix B, p. 1.)

[16]For example, the Assistant Executive Director of NAWCAS, in a "research paper", "Does Present-Day Selling Meet Professional Standards" (1961) (CX 1568, p. 22), stated, "[NAWCAS] composed of independent contractor salesmen, functions as a trade association." Similarly, the Executive Director of NAWCAS stated unequivocally, "Our men are independent contractors . . ." (letter, August 11, 1960, to Executive Secretary of the Screen Actors Guild (RX 156)). We note here that the examiner, who had the opportunity to observe the testimony, stated that he accepted the recorded description in these exhibits rather than the later recollection of the witnesses (I.D., pp. 75-76). According to the "NAWCAS Member Guide Book", over 90% of the members are self-employed (CX 19, p. 35).

and children's apparel market is concerned, the manufacturer's right of control is clearly nonexistent on the basis of the respondents' own rules and regulations, a fact recognized in respondents' proposed findings.[17] The Board's finding that NAWCAS is substantially comprised of independent contractors, depending in large part on the same evidence contained in this record, is consistent with the record herein and we make the same finding.

The Board further found, in concluding that NAWCAS is disqualified from acting as a labor organization, that NAWCAS "in its trade show activities in behalf of independent contractor traveling salesmen members, is engaged in the business of selling apparel in direct competition with apparel manufacturers."[18] Supporting this finding, as the Board noted, are the provisions of the NAWCAS Standard Contract providing that manufacturers are prohibited from engaging in showroom sales of their line in the same city while the traveling salesman is exhibiting the line at a trade show[19] , and paragraph 2(e) which restricts manufacturers in their use of selling alternatives to sales through the traveling salesmen in the latter's territory by requiring them to credit such salesmen for any sales of the line made.

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[17]". . . NAWCAS and its members realized that to most manufacturers, the laboriously and cooperatively built prestige of the trade shows sponsored by local NAWCAS affiliates throughout the country and under the control *not* of the *manufacturer* but of the salesmen themselves, through their membership in the sponsoring local NAWCAS affiliates was considered an important element in promoting the sale of manufacturers' merchandise . . ." Respondents' Proposed Findings, p. 28. (Emphasis in original.)

[18]*Bambury Fashions, Inc., supra* note 11, at 10.

[19]". . . The Company further agrees that if the Salesman belongs to any organized apparel shows or salesmen's groups within said territory that the Company's line will be exhibited only at such

The commercial nature of the trade shows as a business enterprise, as we have already noted, is clear, for "they assist the [independent contractor] salesmen members in obtaining commissions, they assist the manufacturers in obtaining orders for merchandise, and they assist the retailers who attend them in finding competitive goods assembled at a single point for their convenience."[20] The very scale of these trade shows, with an annual sales volume of $3.5 to $4.5 billion, compels the same finding.

The Board, ruling that on this set of facts NAWCAS is disqualified from acting as a labor organization, held:

> "... what disqualifies a union from acting as such when it also conducts a business enterprise in the same industry, is the latent danger that it may bargain, not for the benefit of unit employees, but for the protection and enhancement of its business interests which are in direct competition with those of the employer at the other side of the bargaining table."[21]

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shows or with such groups; provided, that this provision shall not require a Company which has its principal place of business within said territory and maintains a show room on its premises to close such show room" (paragraph 2(a), NAWCAS Standard Contract, CX 618-A).

This restriction on sales by competing manufacturer's outlets which "became crystalized as a clause in the NAWCAS Standard Contract", as the hearing examiner found, "was enforced by withdrawing the manufacturer's line from the trade show if he failed to sign the contract and by imposing a fine on the salesmen whether or not he had the power to comply with the showroom-closing rule" (I.D., p. 61).

Moreover, NAWCAS trade shows are in competition with shows set up by manufacturers (I.D., p. 47).

[20] I.D., p. 46.

[21] *Bambury Fashions, Inc., supra* note 11, at 10.

We are compelled to defer to that ruling. Under the circumstances, the labor antitrust exemption is not available to NAWCAS. The policy behind that exemption clearly envisages that it apply only to those organizations which can function in accordance with the statutory requirements spelled out in the federal labor laws, and a cease and desist order should issue to prevent repetition of the law violations documented in this proceeding.

V.

We turn now to the question of remedy. The first objection that the order is unenforceable because of the Norris-LaGuardia Act's provisions prohibiting injunctions against labor unions is patently untenable in light of our finding that the antitrust exemption does not extend to NAWCAS. Clearly the anti-injunction provisions of the Norris-LaGuardia Act do not shelter organizations not within the scope of the exemption and whose antitrust violations arise essentially out of a commercial enterprise.[22]

The Commission, nevertheless, is of the opinion that it should not make a final decision on the form of the order before giving the parties a further opportunity to file their recommendations, with supporting data, regarding proposals for provisions to be included in a cease and desist order to terminate this proceeding. We take that position because respondents' trade shows, with annual

[22] As Mr. Justice Goldberg stated: "... The labor exemption is inapplicable where the union acts not as a union but as an entrepreneur." Concurring opinion, *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO, et al. v. Jewel Tea Co., Inc.*, 381 U.S. 676, 733 (1965). See also *Streiffer v. Seafarers Sea Chest Corp.*, 162 F. Supp. 602 (E.D. La. 1958).

sales volume in excess of three billion dollars, obviously comprise a vital segment of the women's and children's apparel market. The order should therefore eliminate the practices found unlawful while facilitating the continuance of the competitive function of respondents' trade shows. In short, the Commission needs further information on which to base an appropriate remedy in the light of the impact which a cease and desist order in this proceeding may have on the industry. Understandably, perhaps, in light of the parties' preoccupation with the question of the applicability of the antitrust exemption, these questions have not been fully discussed on appeal.

In addition to the foregoing, the parties should address themselves to the following issues. In light of the administrative burden involved in seeking compliance as to a shifting population of some 12,000 individual members of respondents, could not the same results be achieved by limiting the coverage of the order to NAWCAS, its affiliates, and their officers, agents and representatives? Respondents also object that the order entered by the examiner is so vague that it is not possible to distinguish permissible from impermissible conduct. Respondents' contentions on this point, apparently embracing the whole order, are themselves somewhat indefinite.[23] Without passing on the merits of respondents' assertions on this question, we feel both parties should have the opportunity to draft proposals for an order prohibiting the practices found illegal herein, incorporating such standards as would facilitate compliance for respondents and enforcement for the Commission.

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[23]The only concrete objection on this issue refers to paragraph I (15) of the order.

We do not agree that paragraph II (C) and (D) and paragraph II (3) and (4) are punitive. These prohibitions require that members fined or expelled since May 30, 1964, pursuant to respondents' illegal practices, be recompensed or reinstated. We are of the view, however, that further information is desirable to establish whether such provisions are necessary to dissipate the effect of the illegal combination. The parties should also submit information on whether such requirements would be practical in terms of the enforcement effort required and the impact they would have on respondents' future organization of trade shows. Pertinent data on this point would include the number of ex-members and present members who would be affected by the proposed restitution and reinstatement provisions, as well as the expense involved in administering these provisions. In this connection, respondents, if they are able to do so, should bring to the Commission's attention more specific information with respect to their contention that the reinstatement provisions would require the expulsion of certain individuals comprising the current membership of NAWCAS and its affiliates. In short, while we disagree that these proposals are punitive, we are concerned with getting as much relevant data as possible to determine the practical impact of these provisions.

Accordingly, we direct the parties to submit proposed forms of order with supporting briefs presenting relevant views, data and argument within 30 days of the receipt of this opinion and order. When this information is before it the Commission will issue its final order.

Chairman Weinberger did not participate.

Commissioner Elman did not concur.

July 30, 1970

APPENDIX D

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Miles W. Kirkpatrick, Chairman
Paul Rand Dixon
Everette MacIntyre
Mary Gardiner Jones
David S. Dennison, Jr.

In the Matter of	)
	)
NATIONAL ASSOCIATION OF WOMEN'S AND CHILDREN'S APPAREL SALESMEN, INC., a corporation, et al.	) DOCKET NO. 8691

FINAL ORDER

This matter is before the Commission for a determination of the provisions which should be included in the final order of this proceeding. The Commission has studied both the proposals by complaint counsel and respondents on the form of the order and have heard oral argument thereon. On the basis of its study of the record, the Commission has decided that the substance of the order entered by the examiner should be adopted as the Commission's order with certain modifications. Our modifications include many changes in language embracing deletions, additions, and other changes. A number of modifications are substantive. The more important of those are discussed in the accompanying statement.

Accordingly, on the basis of our review of the record, a study of proposals made by complaint counsel and respondents and for the reasons expressed in the findings, conclusions and opinion previously issued and in the accompanying statement, the Commission enters the following order:

I

IT IS ORDERED that respondents National Association of Women's and Children's Apparel Salesmen, Inc., (also known as NAWCAS Guild, and hereinafter referred to as NAWCAS), a corporation, its officers, representatives, agents, and members of its Board of Governors and Executive Advisory Council; Marshall J. Mantler, individually and as executive director of NAWCAS; and Style Exhibitors, Inc., (hereinafter referred to as Exhibitors), a corporation, individually and as representative of all the affiliated members of NAWCAS that operate trade shows, directly or indirectly, or through any corporate or other device, in connection with the promotion, offering for sale, sale or distribution of women's and children's apparel or accessories in commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from engaging in any of the following acts, practices or things:

(1) Refusing or threatening to refuse to promote, display, offer to sell, distribute, or sell at any trade show women's and children's apparel or accessories supplied by any manufacturer who is represented by a member of NAWCAS, a member of any affiliate, or any person who is otherwise eligible for trade show participation.

(2) Entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, or agreement with any other party for the purpose or with the effect of preventing, hindering, or interferring with a manufacturer from having his merchandise displayed, exhibited, offered for sale or sold in or from any location not actually contracted for and used as space by respondent NAWCAS or by a representative who is a member of NAWCAS, a member of any affiliate, or any person as a part of a NAWCAS trade show participation for the conduct of a trade show sponsored by NAWCAS, its members or affiliates.

(3) Entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, or agreement with any other party for the purpose or with the effect of preventing, hindering, or interferring with a manufacturer's efforts to have his merchandise displayed, exhibited, sold or offered for sale in any space not actually contracted for and used by a representative who is a member of NAWCAS, a member of any affiliate, or any person as a part of a NAWCAS trade show participation.

(4) Restricting, regulating, or limiting any member of NAWCAS, any member of any affiliate, or any person who is otherwise eligible for trade show participation, in the selection of any merchandise that he may wish to display, offer for sale or sell at any trade show or exhibition.

(5) Requiring, whether directly or indirectly any manufacturer of women's and children's apparel or accessories to comply with any demand, term or condition made by NAWCAS or any of its affiliated members as a condition of having the manufacturer's goods exhibited in a NAWCAS affiliated trade show.

(6) Preparing, printing, publishing or otherwise communicating by any method or means any "uncooperative manufacturers list" or similar device with the purpose or effect of discouraging or preventing the merchandise of any particular manufacturer from being exhibited at any affiliate trade show.

(7) Prohibiting or forbidding any member of NAWCAS or of any of its affiliates, from soliciting the representation of any line of merchandise produced by any manufacturer.

(8) Prohibiting or forbidding any member of NAWCAS or of any of its affiliates, from representing any line of merchandise produced by any manufacturer because said member replaced another member as a representative of said manufacturer.

(9) Prohibiting or forbidding the merchandise of any manufacturer from being promoted or displayed, or offered for sale, distribution or sale by any member of NAWCAS or of any of its affiliates, because said member replaced another member as a representative of said manufacturer.

(10) Conditioning the showing by any member of NAWCAS of any merchandise of any manufacturer at any trade show organized by any affiliate or other NAWCAS group on the execution by said member of a contract with the manufacturer he represents containing terms or conditions established by and acceptable to respondents.

(11) Restricting or limiting any affiliate or NAWCAS group from accepting as a member any person who transfers from another affiliate or otherwise is eligible or qualified to sell merchandise of any manufacturer.

(12) Requiring any affiliate or other NAWCAS group to agree with any other affiliate on dates when or places where merchandise may be displayed or exhibited, offered for sale, or sold, except that nothing shall prevent any affiliate from continuing to utilize the dates at which such afffiliate customarily held its shows, or voluntarily agree to show dates.

(13) Denying or granting courtesy or provisional showing of merchandise to any manufacturer unless said manufacturer is first approved by NAWCAS or a NAWCAS affiliate other than the one to which application is being made.

(14) Prohibiting or forbidding any merchandise of any manufacturer represented by a member of NAWCAS or any of its affiliates from being promoted, displayed, exhibited, offered for sale, or sold at any place or any time by said

manufacturer, representative, or other representative designated by said manufacturer.

(15) Prohibiting, restricting, or limiting any person or firm engaged in the offering for sale, distribution or sale of women's and children's apparel or accessories from obtaining any room, rooms, or office space at any time in any facility.

(16) Refusing to accept for membership in NAWCAS any individual who is otherwise eligible for membership and is actively and regularly engaged as a salesman or manufacturer who does not have salesmen and who travels a territory or territories himself, of women's and children's wholesale apparel and accessories irrespective of whether such individual was previously denied or excluded from membership.

(17) Refusing to accept as an exhibitor at any trade show any salesman who may also be a manufacturer, importer, wholesaler, or jobber, or officers or employees thereof, whose line or lines of women's and children's apparel are not exhibited at that trade show by a member of NAWCAS or a member of any of its affiliates.

(18) Continuing to retain any provision in its constitution, by-laws, code of ethics, or rules and regulations which contravenes or conflicts in any way with any of the above prohibitions.

II

IT IS FURTHER ORDERED that respondent NAWCAS shall:

(1) Within thirty (30) days from the effective date of this order mail to or otherwise cause to be served on each of its members a conformed copy of this order.

(2) Provide each applicant for membership in NAWCAS with a conformed copy of this order.

(3) Within ninety (90) days from the effective date of this order:

(a) Withdraw from the files of NAWCAS or any of its officers and directors, and attempt to recover from all members, all lists of names of all manufacturers who have been deemed at any time to be uncooperative, and file with the Secretary of the Federal Trade Commission an affidavit within thirty (30) days thereafter reporting its attempts to recover such lists and the destruction of all such lists recovered.

(b) Notify all manufacturers whose merchandise has been prohibited from trade shows that their merchandise is no longer prohibited from being shown.

(4) No later than the next annual convention of NAWCAS cause the adoption and revision of all by-laws, articles of incorporation or rules and regulations to incorporate each of the prohibitions contained in subparagraphs 1-17 of Part I hereof, and inaugurate a program for the effective enforcement of such amended provisions.

III

IT IS FURTHER ORDERED that respondent Exhibitors and the other affiliate members of respondent NAWCAS shall, within sixty (60) days from the effective date of this order:

(1) Notify each manufacturer whose merchandise has been prohibited from its trade show, except those so notified by respondent NAWCAS, that its merchandise is no longer prohibited from being shown.

(2) Withdraw from and cancel in any agreement, lease or contract with any merchandise mart or other facility all provisions or restrictions that prevent or limit the time, place or method by which any other lessee determines to offer for sale and sell his merchandise.

(3) No later than the next meeting of the membership of respondent Exhibitors and the other affiliate members of NAWCAS, cause the adoption and revision of all by-laws, articles of incorporation and rules and regulations to incorporate each of the prohibitions contained in subparagraphs 1-17 of Part I hereof, and inaugurate a program for the effective enforcement of such amended provisions.

IV

IT IS FURTHER ORDERED that Marshall J. Mantler shall cease and desist, directly or indirectly, from organizing or participating in any activities of, knowingly supporting, being a member of, or contributing anything

of value to any group or association involved in the promotion, offering for sale, sale or distribution of women's and children's apparel or accessories in commerce, the purposes or activities of which are, in any manner, inconsistent with any of the provisions of this order.

V

IT IS FURTHER ORDERED that nothing contained herein shall prevent affiliate members of NAWCAS from retaining, adopting, and enforcing reasonable rules or regulations for the registration and conduct of all persons in attendance at trade shows, so long as such rules or regulations are not prohibited by any of the provisions of this order or are not used as devices to unreasonably restrain trade.

VI

IT IS FURTHER ORDERED that the respondents herein shall within sixty (60) days of the effective date of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order, plus such additional reports thereafter as may be required to show compliance with all terms and conditions herein.

IT IS FURTHER ORDERED that respondents notify the Commission at least thirty (30) days prior to any proposed change in the structure or status of respondents such as dissolution, assignment or sale resulting in the emergence of a successor, the creation or dissolution of subsidiaries, the creation or dissolution of affiliate members, or any other change which may affect compliance obligations arising out of this order.

By the Commission, with Chairman Kirkpatrick not participating.

/s/ Chas. A. Tobin
Charles A. Tobin
Secretary

SEAL

ISSUED: February 25, 1971

APPENDIX E

SECTION 5(a) (1) OF THE FEDERAL TRADE COMMISSION ACT, 15 USC §45(a) (1)

Unfair methods of competition unlawful; prevention by Commission. Declaration of unlawfulness; power to prohibit unfair practices.

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful. (Sept. 26, 1914, ch. 311, §5, 38 Stat. 719; Feb. 13, 1925, ch. 229, § 2, 43 Stat. 939; Mar. 21, 1938, ch. 49, §3, 52 Stat. 111; June 25, 1948, ch. 646, § 1107(f), 52 Stat. 1028; June 25, 1948, ch. 646, §32(a), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Mar. 16, 1950, ch. 61, § 4(c), 64 Stat. 21; July 14, 1952, ch. 745, § 2, 66 Stat. 632; Aug. 23, 1958, Pub. L. 85-726, Title XIV, §1411, 72 Stat. 809; Aug. 28, 1958, Pub. L. 85-791, § 3, 72 Stat. 942; Sept. 2, 1958, Pub. L. 85-909, § 3, 72 Stat. 1750; June 11, 1960, Pub. L. 86-507, § 1(13), 74 Stat. 200).

SECTION 6 OF THE CLAYTON ACT 15 USC §17

Antitrust laws not applicable to labor organizations.

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purposes of mutual help, and not

having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. (Oct. 15, 1914, ch. 323, § 6, 38 Stat. 731.)

SECTION 20 OF THE CLAYTON ACT
29 USC § 52

Statutory restriction of injunctive relief.

No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose

of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other moneys, or things of value; or from peaceably assembling in a lawful manner, and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States. (Oct. 15, 1914, ch. 323, § 20, 38 Stat. 738).

SECTION 2 OF THE NORRIS-LAGUARDIA ACT
29 USC § 102

Public policy in labor matters declared.

In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to

associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted. (Mar. 23, 1932, ch. 90, § 2, 47 Stat. 70.)

SECTION 4 OF THE NORRIS-LAGUARDIA ACT
29 USC § 104

Enumeration of specific acts not subject to restraining orders or injunctions.

No court of the United Stated shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 103 of this title;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value.

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 103 of this title. (Mar. 23, 1932, ch. 90, § 4, 47 Stat. 70.)

SECTION 5 OF THE NORRIS-LAGUARDIA ACT
29 USC § 105

Doing in concert of certain acts as constituting unlawful combination or conspiracy subjecting person to injunctive remedies.

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title. (Mar. 23, 1932, ch. 90, §5, 47 Stat. 71.)

SECTION 13 OF THE NORRIS-LAGUARDIA ACT 29 USC §113

Definitions of terms and words used in chapter.

When used in this chapter, and for the purpose of this chapter –

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia. (Mar. 23, 1932, ch. 90, § 13, 47 Stat. 73.)

SECTION 2(5) OF THE NATIONAL LABOR RELATIONS ACT, 29 USC §152(5)

Definitions.

When used in this subchapter –

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(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or

in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. (July 5, 1935, ch. 372, § 2, 49 Stat. 450; June 23, 1947, ch. 120, Title I, §101, 61 Stat. 137.)